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As to whether a bailee may contract for exemption from ordinary care or skill, see *Field v. Brackett*, 56 Me. 121.

Burden of Proof.—It is a general rule that a party alleging a fact must prove it. So it follows that if the bailor of a chattel allege a loss or injury to it, he must prove that it was caused by the bailee's negligence. Proof of loss or injury while in the hands of the bailee is not sufficient: *Harrington v. Snyder*, 3 Barb. 380; *Newton v. Pope*, 1 Cow. 109. These were both cases of an injury to a horse by carelessness. See also *Runyan v. Caldwell*, 7 Humph. 134; *Browne v. Johnson*, 29 Tex. 43. The application of the rules concerning the burden of proof in cases of negligence, are not always clearly stated; but in general it may be said that where the property bailed is returned in a damaged state, or not at all, the bailee ought to exculpate himself, and a jury may weigh all the evidence thus submitted: *Collins v. Bennett*, 46 N. Y. 490; *McDaniels v. Robinson*, 26 Vt. 340; *Logan v. Mathews*, 6 Penn. St. 417; *Fulton v. Alexander*, 21 Tex. 148; *Goodfellow v. Meegan*, 32 Mo. 280; *Cumins v. Wood*, 44 Ill. 416.

Termination of the Bailment.—This

may be accomplished in several ways by the accomplishment of the purpose of the bailment, the destruction of the property by inevitable casualty, by mutual consent of the parties, by operation of law, as where the bailee purchases the thing hired: *Story Bailm.*, sect. 418; *Wright v. Melville*, 3 C. & P. 542; *Halyard v. Dechelman*, 29 Mo. 459; *Sargent v. Gile*, *supra*. If the term of hiring is fixed, the bailee should return it at that time, but if no time is fixed the law assumes a reasonable time: *Green v. Hollingsworth*, *supra*; *Cobb v. Wallace*, 5 Cald. 539. But a gratuitous bailment may be terminated at the bailor's pleasure: *Orser v. Storms*, 9 Cow. 687; *Drake v. Redington*, 9 N. H. 243. The general rule requires the bailee to return the thing hired on the determination of the contract: *Benje v. Creagh*, 21 Ala. 151. And from the very elements of his contract, if he fails to deliver it to the rightful owner, he is guilty of a conversion: *Stephenson v. Hart*, 4 Bing. 476; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Coykendall v. Eaton*, 55 Barb. 188; *Clafin v. Boston, &c., Rd.*, 7 Allen 341.

A. G. McKEAN.

Detroit, Mich.

Supreme Court of Michigan.

FARWELL v. MYERS.

Where vendors rescind a sale on the ground of fraud, and bring replevin under which a portion of the goods is seized and returned, they cannot recover for the balance against the assigned estate of the vendee upon a claim for goods sold and delivered, but must bring an action on the tort.

CAMPBELL, C. J., and SHERWOOD, J., dissented.

ERROR to Cass.

Hiram A. Fletcher and *George P. Wanty*, for plaintiffs and appellants.

Howell & Carr, for defendant.

The opinion of the court was delivered by

MORSE, J.—Between August 7th and December 10th 1883, the defendant, who was then engaged in the mercantile business at Cassopolis, Michigan, bought of plaintiffs several bills of goods, amounting in the aggregate to \$10,396.69, and paid on account \$896.14. On January 4th 1884, defendant made a general assignment for the benefit of his creditors to one Henry W. Smith. This assignment is admitted to be valid, and this suit is in recognition of the same. On the eighth day of January 1884, the plaintiffs brought replevin in Circuit Court of United States for Western District of Michigan, for all the goods sold by them to Myers, as hereinbefore mentioned, and their writ of replevin mentioned and described, and commanded the marshal to take and deliver to the plaintiffs each and all the articles sold by them to him, as aforesaid. On this writ the marshal took and delivered to the plaintiffs goods therein mentioned, valued and appraised at \$3420, but which had been charged to defendant in said account at \$4104, and this latter sum made a part of the said \$9500.55. The goods so taken by the marshal were such as he found in the store, and were parts of all the different bills purchased, and he returned that he was unable to find the other goods in said writ mentioned. The plaintiffs grounded their replevin suit upon the claim that Myers did not intend to pay for the goods when he bought them, and that they had, before they brought their suit in replevin, elected to rescind the sale to him in consequence of his fraud, and gave notice of such election to the assignee before this writ of replevin issued. The replevin suit was tried upon this theory, the evidence sustained it, and the plaintiffs had judgment on the twelfth day of December 1884. On the fifteenth day of December 1884, the plaintiffs filed their claim in the clerk's office of Cass county, attached to which was a statement of their account. Plaintiffs filed their claim, basing it upon said account as for goods sold and delivered, stating that the consideration was for merchandise, and that the debt was contracted at the dates the goods were delivered, and made no mention of the suit in replevin, or the judgment therein, crediting the defendant, however, with \$2267.15, as of March 20th 1884, being, presumably, their estimation of the value of the goods recovered under their action of replevin.

These facts appeared by stipulation, and also that on the 26th of December 1884, there was still in the hands of the assignee about

\$1500, besides some collectible accounts and notes, part of which were not yet due, all of which still remained in the hands of the assignee; that the proof of claim should be considered as complying with the requirements of the statute, and the credit item of \$2267.15 should be considered as \$4104, leaving balance against the insolvent's estate of \$5396.55, and all formal defects in said proof of claim were waived. On the 13th of May 1884, thirty-nine other creditors had proven claims against said estate, aggregating \$15,368.67, and the assignee, after due notice, had declared and paid to them a dividend of 20 per cent. before the filing of plaintiffs' claim. The assignee gave all the notices required by law, of the assignment, and of proof of claims prior to January 15th 1884, and filed proof thereof as required by law, and the plaintiffs had all the statutory notices required by law prior to that date. On the 23d day of December 1884, the assignee gave notice that the claim of plaintiffs, as filed, would be contested, and the same was thereupon duly entered on the law side of the court as a cause in the name of said plaintiffs as against said defendant, and a trial was had of the same, under the statute, before the court without a jury. The circuit judge found, as a matter of law, upon the facts above stated, that the claim of plaintiffs could not be sustained, and entered judgment disallowing the same.

It is urged here that, under the facts, the plaintiffs are entitled to recover. We do not think so. Early in the proceedings, immediately after the assignment, the plaintiffs elected to rescind the sale of the goods, and brought replevin for the same on the theory that the fraud of the defendant had vitiated the sale, and that the goods belonged to them as if no sale had ever been made. After thus solemnly electing their remedy, and proceeding, through a trial to judgment, upon the theory that they owned the goods, because they failed to get adequate relief in such suit, they cannot be allowed, a year afterwards, to come into court, and base a claim upon the inconsistent idea that the goods were sold to defendant. One theory is totally at variance with the other. If one elects between two inconsistent remedies, the right to pursue the other is for ever lost: *Thompson v. Howard*, 31 Mich. 309; *Wetmore v. McDougall*, 32 Id. 276; *Dunks v. Fuller*, Id. 243; *Neild v. Burton*, 49 Id. 53.

We do not deny the right of plaintiffs to collect the balance, the value of the goods not recovered by his action in replevin, in a pro-

per action for the conversion of the same ; but he cannot do so upon the claim filed with the assignee, counting upon the original contract for goods sold and delivered. If he should elect to waive the tort, and sue in *assumpsit*, he would yet have to declare specially averring the tort: *Tregent v. Maybee*, 54 Mich. 226.

The judgment of the court below must be affirmed, with costs.

CHAMPLIN, J., concurred.

CAMPBELL, C. J., (*dissenting*).—I am unable to concur in the view that plaintiffs, by replevying a part of the goods which were fraudulently obtained from them by defendant, thereby lost their right to pursue him for the balance by an action of *assumpsit*. The right which a defrauded vendor has to reclaim goods fraudulently obtained by the purchaser is not, in any just sense, an absolute ending of their relations. The case before us in no way differs from that where a vendor enforces a right of stoppage in transitu, which does not always secure all the goods sold. In such a case the law is now clear that the effect of the reclaiming of a part of the goods is not to destroy the vendor's right to sue for the value of the remainder. It is more a matter of words than of substance, to hold that in such a case there is no interference with the contract itself ; for, practically, a sale is very seriously interfered with by any retention or reclamation of the goods sold. Neither is it very important to inquire on what particular theory the plaintiffs' rights are insisted on. There can be no doubt that if the contract is considered as rescinded, the goods not replevied and disposed of by defendant must be accounted for in some way. Whether treated as sold or as tortiously converted, the plaintiffs, according to well-settled rules, could always sue in *assumpsit* for the proceeds or value, and could do so under the common counts or specially. The demand for these moneys is not one for damages at large, as for a wrong, but is a pecuniary claim based on fixed rules of recovery. I do not think there is anything in our statutes, or in bankruptcy proceedings anywhere, which would prevent the proof of any such claim for which implied *assumpsit* lies ; and it seems to me that any rule which cuts off such a redress would be in furtherance of the vendee's fraud. In *Powers v. Benedict*, 88 N. Y. 605, the doctrine was recognised that a partial recovery of goods, under such circumstances, did not bar an action for the remainder. We held, ourselves, in *Dayton v. Monroe*, 47 Mich. 193, that a person suing

for fraud was not bound to return a note which was given for the consideration as a condition of suing. And it seems to me that no doctrine can be sound which puts a person to a complete election at his peril, and bars him from any adequate remedy against the wrongdoer. Our statute concerning claims does not cut off any claim which can be regarded as an obligation of the assigning debtor, and the right to a judgment and relief is the same as if there had been no assignment. In a case of this kind no mere technicality should stand in the way of justice. That defendant is responsible for the unrecovered goods is beyond dispute. Being so, I think there should be a recovery as claimed, and that the judgment should be reversed, and a new trial granted.

SHERWOOD, J., concurred.

It is a general principle, that fraud renders a sale of chattels voidable; but what acts upon the part of the vendee, or circumstances connected with his financial standing will have this effect, is a question in dispute.

It is very generally held that fraudulent representations or the active suppression of insolvency for the purpose of obtaining a false credit, will make a sale voidable at the option of the vendor: *Cross v. Peters*, 1 Me. 376; *Redington v. Roberts*, 25 Vt. 686; *Morrill v. Blackman*, 42 Conn. 329; *Lupin v. Marie*, 6 Wend. 81; *Buckley v. Artcher*, 21 Barb. 585; *Fisher v. Conant*, 3 E. D. Smith 199; *Nichols v. Pinner*, 18 N. Y. 295; *Devoe v. Brandt*, 53 Id. 462; *O'Reer v. Strong*, 13 Ill. 688; *Powell v. Bradlee*, 9 G. & J. (Md.) 220; *Conyers v. Ennis*, 2 Mason 236; *Garbutt v. Bank*, 22 Wis. 384; *Biggs v. Barry*, 2 Curtis C. C. 259; *Cross v. Peters*, 1 Greenl. 376; *Thompson v. Rose*, 16 Conn. 71.

It is sufficient that the fraudulent representations are made by a third person to whom the vendee refers the vendor: *Fitzsimmons v. Joslin*, 21 Vt. 129.

Such representations differ from a warranty in that they may be made at any time previous to the contract of sale: *Seaver v. Dingley*, 4 Greenl. 306. And fraud may be evidenced by transactions

with others about the same time: *Stewart v. Emerson*, 52 N. H. 301; *Bradley v. Obear*, 10 Id. 477; *Wiggins v. Day*, 9 Gray 97; *Rowler v. Bigelow*, 12 Pick. 316; *Cary v. Hotailing*, 1 Hill 311; *Hennequin v. Naylor*, 24 N. Y. 139.

A preconceived design not to pay for goods is sufficient, by the great weight of authority, to make a sale voidable: *Dowd v. Tucker*, 41 Conn. 203; *Lynch v. Beecher*, 38 Id. 493; *Wiggins v. Day*, 9 Gray 97; *Dow v. Sanborn*, 3 Allen 181; *Durell v. Haley*, 1 Paige 492; *Ash v. Putnam*, 1 Hill 302; *Barnard v. Campbell*, 65 Barb. 286; *Fox v. Webster*, 46 Mo. 181; *Irving v. Motly*, 7 Bing. 543; s. c. 5 Moore & P. 380. But a contrary rule prevails in Pennsylvania, where it is held "that there must be artifice intended and fitted to deceive practised upon the vendor: *Smith v. Murphy*, 21 Penn. St. 367; *Backentoss v. Speicher*, 31 Id. 324; *Pottinger v. Hecksher*, 2 Gr. 309.

The mere fact that the vendee is insolvent, and knew himself to be so at the time of the sale, while evidence of a fraudulent intent, is not of itself sufficient to avoid the sale: *Redington v. Roberts*, 25 Vt. 686; *Patton v. Campbell*, 70 Ill. 72; *King v. Phillips*, 8 Bosw. 603; first list of cases, *ante*. But in *Mitchell v. Worden*, 20 Barb.

253, it was held, that where there had been a series of transactions between vendor and vendee, extending over a length of time, and giving rise to a trust and confidence, that an open act of bankruptcy upon the part of the vendee unknown to the vendor at the time of sale, would render it voidable.

As fraud renders a sale *voidable* and not *void*, *bona fide* purchasers, mortgagees and pledgees are protected in any rights in the chattels acquired from the vendee, previous to the vendor's electing to rescind the sale: *O. & M. Ry. Co. v. Kerr*, 49 Ill. 458; *Williamson v. Russell*, 39 Conn. 412; *Dow v. Sanborn*, 3 Allen 181; *Hoffman v. Noble*, 6 Met. 68; *Parker v. Patrick*, 5 T. R. 175; *Benj. Sales*, § 433, 3d ed.; *Story Sales*, § 446, a; *Schouler's Pers. Prop.* 638. But in *Hartt v. McNeil*, 47 Mo. 526, it was held that a *bona fide* pledgee's interest is not protected.

Attaching and execution creditors of the vendee acquire no greater rights than their debtor: *Schweizer v. Tracy*, 76 Ill. 345; *Hawes v. Dingley*, 17 Me. 341; *Jordan v. Parker*, 56 Id. 557; *Durell v. Haley*, 1 Paige 492; *Ash v. Putnam*, 1 Hill 302; *Mowrey v. Walsh*, 8 Cow. 238; *Hitchcock v. Covill*, 20 Wend. 167; *Wiggin v. Day*, 9 Gray 97; *Bussing v. Rice*, 2 Cush. 48; *Buffington v. Gerrish*, 15 Mass. 156. And it has been said that such is the case though the debt sought to be recovered, is one incurred subsequent to the sale, and upon credit of the goods: *Field v. Stearns*, 42 Vt. 111; but this proposition is disputed: *Gilbert v. Hudson*, 4 Greel. 345; *Bradley v. Obear*, 10 N. H. 477; *Thompson v. Rose*, 16 Conn. 71.

Where goods fraudulently obtained are sold in satisfaction of a pre-existing debt, the second vendee's rights in the property are subject to those of the original vendor: *Barnard v. Campbell*, 58 N. Y. 73; *Root v. French*, 13 Wend. 570; *Lupin v. Marie*, 2 Paige 170; *Jackson v. Myers*, 11 Wend. 533; *Poor*

v. Woodburn, 25 Vt. 234; *Lynch v. Beecher*, 38 Conn. 490; *McLeod v. Bank*, 42 Miss. 99; *Johnson v. Peck*, 1 Wood. & Min. C. C. 334. But see *contra*, *Waggoner v. Cooley*, 17 Ill. 239; *Lee v. Kimball*, 45 Me. 172; *Gibson v. Moore*, 7 B. Mon. 92; *Titcomb v. Wood*, 38 Me. 561; *State v. Schulein*, 45 Mo. 521; *Abbott v. Barrg*, 5 Moore 98.

A third party obtaining goods with knowledge of the fraud, is not protected: *Phelps v. Conant*, 30 Vt. 277; *Allison v. Matthieu*, 3 Johns. 236; *Hyde v. Ellery*, 18 Md. 496; *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; 1 Chit. Pl. 100; and the burden of proof is on the party claiming *bona fides*: *Devoe v. Brandt*, 53 N. Y. 462.

A re-purchase from a *bona fide* purchaser remits the fraudulent vendee to his original position; *Schutt v. Large*, 6 Barb. 380.

Upon discovery of fraud, the vendor has an election to affirm or rescind the sale. He may waive the tort and sue in assumpsit: *McCullough v. McCullough*, 14 Penn. St. 295; *Butts v. Collins*, 13 Wend. 154; *Berly v. Taylor*, 5 Hill 577; *Hinds v. Tweddle*, 7 How. (N. Y.) 278; *Ketletas v. Fleet*, 7 Johns. 324; *Gray v. Griffith*, 10 Watts 431; *Sanders v. Hamilton*, 3 Dana 552; *Patterson v. Prior*, 18 Ind. 440; *Jones v. Gregg*, 17 Id. 84; *Johnson v. Reed*, 3 Eng. 202; *O'Conley v. Natchez*, 1 Sm. & M. 31; *Foster v. Stewart*, 3 M. & S. 191; *Gill v. Kyner*, 5 Moore 525. The weight of authority seems to favor the doctrine, that, if he adopts this course, he must wait till the expiration of any credit given: 1 Chit. Pl. 107; *Dellone v. Hull*, 47 Md. 112; *Ferguson v. Carrington*, 9 B. & C. 59. In *Strutt v. Smith*, 1 C., M. & R. 411, the court say, "It is clear that the plaintiffs cannot avail themselves of the defendant's fraud, so as to rescind the contract, and substitute a new contract of sale on different terms."

Other courts permit assumpsit to be

brought before the expiration of the credit: *Mann v. Stowell*, 3 Chand. (Wis.) 243; *Hogan v. Shee*, 2 Esp. 522; *De Symons v. Minchwich*, 1 Id. 430. So in *Wigand v. Sichel*, 3 Keyes (N. Y. Ct. App.) 120, it is said that "It is not accurate to say that the plaintiffs sought to avoid the contract of sale. It is the credit only, that is sought to be avoided." The doctrine of this decision is criticised and rejected in *Kellogg v. Turpie*, 93 Ill. 269.

Where the latter rule prevails, assumption would probably lie in all cases, though the goods had not been converted to money: *Roth v. Palmer*, 27 Barb. 652; *Putnam v. Wise*, 1 Hill 234; *Chambers v. Lewis*, 2 Hilt. 591; *Fiquet v. Allison*, 12 Mich. 328; *Stockett v. Watkins*, 2 Gill & Johns. 326.

It is a general rule, however, that goods fraudulently obtained, must have been converted to money before assumption lies: *Emerson v. McNamara*, 41 Me. 565; *Smith v. Smith*, 43 N. H. 536; *Phelps v. Conant*, 30 Vt. 277; *Winchell v. Noyes*, 23 Id. 303; *Gilmore v. Wilbur*, 12 Pick. 120; *Jones v. Hoar*, 5 Id. 285; *O'Reer v. Strong*, 13 Ill. 688; *Morrison v. Rogers*, 2 Scan. 317; *Willet v. Willett*, 3 Watts 277; *Schweizer v. Weber*, 6 Rich. (S. C.) 159; *Hutchinson v. Phillips*, 6 Eng. 270; *Lindon v. Hooper*, Cowp. 419. If the vendor elect to rescind the sale, replevin will lie for the goods or trover for their value: *Brown v. Pierce*, 97 Mass. 49; *Kline v. Baker*, 99 Mass. 255; *Seaver v. Dingley*, 4 Greenl. 306; *Prentiss v. Russ*, 16 Me. 60; *Durrell v. Haley*, 1 Paige 492; *Noble v. Adams*, 7 Taunt. 59.

It has been held that the vendor may retake the property by stratagem: *Earl Bristol v. Wilsmore*, 2 Dowl. & Ryl. 755. Or by the use of necessary force: *Hodgeden v. Hubbard*, 18 Vt. 504; *Patrick v. Colerick*, 3 M. & W. 483.

A carrier who has been induced to

part with chattels by fraudulent representations may replevy them; *Bigelow v. Heaton*, 6 Hill 44.

The evidence of fraud to justify a rescission must be clear: *Henshaw v. Bryant*, 4 Scan. 387; *Warren v. Walbridge*, 61 Ill. 173; *Martin v. Wirts*, 11 Bradw. (Ill.) 567. And the right of election must be exercised within a reasonable time after discovery of the fraud: *Bulkley v. Morgan*, 46 Conn. 393; *Emerson v. McNamara*, 41 Me. 565; *Johnson v. McLane*, 7 Blackf. 501; *Stewart v. Dougherty*, 3 Dana 479; *Hopkins v. Appleby*, 1 Stark. 477; *Cash v. Giles*, 3 Car. & P. 407.

It is a general principle that a vendor electing to rescind, must rescind the contract *in toto*, and place the other party in *statu quo*: *Cushing v. Wyman*, 38 Me. 589; *Tisdale v. Buckmore*, 33 Id. 461; *Cushman v. Marshall*, 21 Id. 122; *Ayers v. Hewett*, 19 Id. 281; *Norton v. Young*, 3 Greenl. 30; *Poor v. Woodburn*, 25 Vt. 234; *Allen v. Edgerton*, 3 Id. 443; *Kimball v. Cunningham*, 4 Mass. 502; *Moyer v. Shoemaker*, 5 Barb. 322; *Fisher v. Conant*, 3 E. D. Smith 199; *Fisher v. Fredenhall*, 21 Barb. 82; *Rutter v. Blake*, 2 Har. & J. 353; *Johnson v. McLane*, 7 Blackf. 501; *Moriarty v. Stofferan*, 89 Ill. 528; *Jennings v. Gage*, 13 Id. 612; *Buchenau v. Horney*, 12 Id. 336; *Weed v. Morris*, 7 Wis. 503. And if this can not be done, his remedy is by an action on the case for deceit: *Hogan v. Weyer*, 5 Hill 389; *Connor v. Henderson*, 15 Mass. 319; *Perley v. Balch*, 23 Pick. 283; *Coolidge v. Brigham*, 1 Met. 550; *Hammond v. Buckmaster*, 22 Vt. 375; *Blackburn v. Smith*, 2 Exch. 783; *Hunt v. Silk*, 5 East. 449; *Beed v. Blandford*, 2 You. & Jer. 278.

The tender back of the consideration received must generally be made before trial, but it is sufficient to tender a note at the trial: *Thurston v. Blanchard*, 22 Pick. 18; *Nichols v. Michael*, 23 N.

Y. 264; *Ryan v. Brant*, 42 Ill. 78; *Emerson v. McNamara*, 41 Me. 565.

Having made his election the vendor is bound by the choice, and can not afterwards pursue an inconsistent remedy: *Joslin v. Cowee*, 52 N. Y. 90; *Bank v. Beale*, 34 Id. 473; *Fanchon v. Goodman*, 29 Barb. 315; *Butler v. Hildreth*, 5 Met. 49; *Brinley v. Tibbits*, 7 Greenl. 70; *Junkins v. Simpson*, 14 Me. 364; *Dibble v. Sheldon*, 10 Blatchf. 178; *Floyd v. Browne*, 1 Rawle 121; *Kitchen v. Campbell*, 3 Wils. 308; *Bennet v. Francis*, 4 Esp. 28; *Brewer v. Sparrow*, 1 M. & R. 2; *Bulkley v. Morgan*, 46 Conn. 394; *Morris v. Rexford*, 18 N. Y. 552.

If the fraud is discovered during the course of legal proceedings, to enforce the contract, the vendor must not proceed to judgment, or he will be held to have affirmed the contract: *Lloyd v. Brewster*, 4 Paige 541.

In *Dean v. Yates*, 22 Ohio St. 388, a suit in attachment was held not an affirmation of the contract: *contra*, *Bulter v. Hildreth*, 5 Met. 49; while in *Gray v. St. John*, 35 Ill. 222, it was re-

garded sufficient evidence to prove a *prima facie* affirmation.

Upon the distinct question in the main case the precedents are few. In *Voorhees v. Earl*, 2 Hill 288, it seems to have been held that a vendee cannot rescind as to part of goods sold on account of fraud, and affirm as to the remainder.

In *Morford v. Peck*, 46 Conn. 384, it was admitted as law, that where a portion of goods fraudulently obtained have been resold to a third party having knowledge of the fraud, the fact that the original vendee has been sued in assumpsit for the portion not sold by him, will not bar an action of replevin for the portion in possession of the second vendee; the court recognising the distinction that a sale may be affirmed as part of goods sold and rescinded as to the remainder, where the division of the property was beyond the control of the original vendor. This rule would seem conformable to justice, if not to the more general rules of the precedents.

CHAS. A. ROBBINS.

Chicago.

Court of Appeals of Maryland.

SEEMULLER v. FUCHS.

An auctioneer has all the liabilities of an ordinary agent. He is not, like a sheriff, a public officer.

An auctioneer selling goods "as auctioneer," but without naming the person for whom he sells, is liable as if selling for himself, and if the title turns out defective, may be sued by the vendee, independently of the doctrine of implied warranty of title, in an action for money had and received, on the ground that the consideration has wholly failed.

An auctioneer sold a piano at public auction, "as auctioneer," but without naming his principal. One with a superior title to the piano took it from the vendee, who thereupon sued the auctioneer to recover back the purchase-money. *Held*, that the auctioneer was liable.

The opinion of the court was delivered by

ROBINSON, J.—One Weeks, being in the possession of a piano